STATE OF MICHIGAN

COURT OF APPEALS

MID MICHIGAN RENTALS, INC. and GERALD JACOB GRAY, Plaintiffs-Appellees, V CITY OF MOUNT PLEASANT, Defendant-Appellant.	UNPUBLISHED October 28, 2003 No. 240655 Isabella Circuit Court LC No. 01-000550-CZ

Before: Fitzgerald, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals the trial court's order denying its motion for summary disposition and granting summary disposition to plaintiffs. We reverse and remand for further proceedings consistent with this opinion. This appeal is decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Procedural History

This case concerns apartment rentals at the Basin Building located in the central business district of the City of Mount Pleasant. The Basin Building was originally constructed in 1950 to house city government offices, but Thomas Horgan bought the building from Mount Pleasant in the 1980s and converted it into commercial space and apartments. Michael Poff bought the building from Horgan in 1990 and Gerald Gray bought the building from Poff in 1993 or early 1994. In 1998, Gray transferred the building to his corporation, Mid-Michigan Rentals, Inc.

Each private owner of the Basin Building knowingly overoccupied the apartments, contrary to a city ordinance that prohibited more than two unrelated adults, or one family, to occupy each unit. The record reflects that, throughout their ownership, Gray and Mid-Michigan rented each apartment to three or four unrelated tenants, primarily students who attended Central Michigan University. In 1995, after they were cited for the ordinance violation, plaintiffs applied for a variance that would permit the increased occupancy, but the variance was denied. Thereafter, the city sought plaintiffs' input on a potential zoning change to allow rooming and boarding dwellings in the commercial district that would allow more tenants to occupy each downtown apartment. Concurrently, the city began to consider changes to its definition of "family" in the zoning ordinance in light of decisions

in *Charter Township of Delta v Dinolfo*, 419 Mich 253; 351 NW2d 831 (1984) and *Stegeman v City of Ann Arbor*, 213 Mich App 487; 540 NW2d 724 (1995).[1]

Acting on plaintiffs' behalf, attorney Marc Daneman maintained that, rather than adding rooming and boarding dwellings to the ordinance, the city should redraft its definition of "family" to include up to four unrelated persons. To comply with *Dinolfo* and *Stegeman*, the city amended its definition of "family" on March 23, 1998.[2] The new

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[1] In the 1980s, the city's definition provided:

> A family is defined as either:
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> A. One or two persons living together in a single dwelling unit.
>
> B. Parents or persons legally married with their direct lineal descendants, whether natural or adopted, including domestic servants thereof together with not more than one person not so related, living together in the whole or part of the dwelling comprising a single dwelling unit.

[2] The amended definitions provided:

> A family is defined as either:
>
> (1) One or more persons related by blood, marriage, adoption or guardianship, plus not more than one person not so related, living as a single housekeeping unit in all districts.
>
> (2) Two persons plus their offspring living as a single housekeeping unit in all residential districts.
>
> (a) One professional caregiver such as a nurse, nanny, physical therapist, etc., caring for either of the persons or their offspring may also reside in the dwelling.
>
> (b) OFFSPRING means descendants, including biological offspring, adopted children, foster, and legal wards.
>
> (3) A functional family living as a single housekeeping unit which has received a permit pursuant to this section. Said permit will be issued by the City Planner following verification of compliance with the requirements of § 154.003, DWELLING, FUNCTIONAL FAMILY.
>
> (a) FUNCTIONAL FAMILY means a group of people plus their offspring having a relationship which is functionally equivalent to a family. The relationship must be of a permanent and distinct character with a demonstrable and recognizable bond characteristic of a cohesive unit. Functional family does not include any society, club, fraternity, sorority, association, lodge, organization or group or students or other individuals where a common living arrangement or basis for establishment of a housekeeping unit is temporary.

definition included both traditional and "functional families," but did not increase the number of unrelated persons who may occupy each dwelling if those persons are not members of a "functional family." Despite subsequent hearings about potential changes to allow for additional occupancy, Daneman requested that further consideration of increased occupancy issues be tabled until more information could be presented.

In November 2001, the city issued six civil infraction tickets to Gerald Gray because his apartments were overoccupied. On March 21, 2001, while the civil infraction case was pending in district court, plaintiffs filed their complaint in this case and challenged the constitutionality of the 1998 zoning ordinance.[3] Plaintiffs also alleged claims of partial taking, inverse condemnation, violation of 42 USC § 1983, vested, nonconforming use, laches and estoppel. The trial court ultimately, erroneously, granted summary disposition to plaintiffs because the trial court ruled that plaintiffs established a vested, nonconforming use. Because of its ruling on the issue of nonconforming use, the trial court declined to address the other challenged claims. We reverse the trial court's ruling and thus remand for consideration of issues that were unaddressed.

II. Analysis[4]

"A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully pre-existed the zoning regulation's effective date." *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000). Here, to establish a vested non-conforming use, plaintiffs, as successor owners, had to show that a prior owner used the property lawfully and that plaintiffs merely continued that use. "The zoning restriction's enactment date is the critical point in determining when a nonconforming use vests." *Heath Twp v Sall*, 442 Mich 434, 441; 502 NW2d 627 (1993). Plaintiffs argued in at least one brief below that the critical issue is whether Horgan *bought* the building before the ordinance was passed. As a matter of law, the question is when the *use* began, not when ownership began.[5]

Plaintiffs asserted in their second amended complaint that the city changed its zoning ordinance *after* Horgan had city approval to build the apartments. Without analyzing whether "city approval" alone can establish a lawful, nonconforming use, the

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[3] The complaint indicates that plaintiffs filed a motion to hold the district court action in abeyance pending determination of this case. Subsequent copies of the complaint do not refer to the other action; however, defendant's brief states that "[t]he parties agreed the tickets would be dismissed to permit Plaintiffs/Appellees to file a civil lawsuit to resolve the legal issues related to occupancy."

[4] This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[5] To establish a vested nonconforming use, "a property owner must engage in 'work of a 'substantial character' done by way of preparation for an actual use of the premises.' " *Heath, supra* at 439, quoting *Bloomfield Twp v Beardslee*, 349 Mich 296, 307; 84 NW2d 537 (1957).

documentary evidence does not support plaintiffs' assertion. Plaintiffs maintain that the ordinance was enacted in 1984. Assuming that is true, the other evidence indicates that the city's ordinance was in effect *before* Horgan converted the building into apartments. Gray testified at his deposition that the apartments were built in the "mid-1980s." This does not put a specific date on the construction and Gray's testimony is also hearsay - Gray said he "was led to understand" that the apartments were built in the mid-1980s during conversations with either Poff or Horgan.[6] Moreover, while plaintiffs submitted a memo that states that a Basin Building renovation may have occurred in 1984 (which could have been before or after the enactment of the 1984 ordinance), this evidence was not presented to the trial court and will not be considered on appeal.[7] Also, significantly, Horgan admitted that he intentionally overoccupied the apartments in violation of the city ordinance.

Therefore, on the basis of the admissible evidence presented, Horgan clearly built and rented the apartments *after* the zoning ordinance was in place and he knowingly violated the ordinance. Under the then-existing ordinance, Horgan's act of renting the apartments to three and four students was unlawful. Therefore, plaintiffs failed to establish a lawful, nonconforming use that continued through plaintiffs' ownership.

Plaintiffs argue that, if the zoning ordinance *was* in place when the apartments were overoccupied, it was automatically void when our Supreme Court decided *Dinolfo* and, therefore, the overoccupancy was lawful and became a nonconforming use when the city enacted its new ordinance in 1998. Plaintiffs never brought a lawsuit to challenge the ordinance in effect at the time Horgan built the apartments or when plaintiffs bought the building. Indeed, plaintiffs appear to have acknowledged the validity of the ordinance by attempting to obtain a variance from it in 1995. Further, in its brief, the only cases plaintiffs cite in support of their argument are *Marbury v Madison*, 5 US 137; 2 L Ed 60 (1803) and *Lewis v State of Michigan*, 464 Mich 781, 788-789; 629 NW2d 868 (2001), neither of which stand for the proposition that an unchallenged ordinance is automatically and retroactively rendered void at its inception if a similar ordinance from another township is found to be unconstitutional.[8]

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[6] "[D]epositions . . . offered in support of or in opposition to a motion based on subrule (C) . . . (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

[7] "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

[8] It is well settled that a zoning ordinance is presumed to be valid and the burden is on the party challenging the ordinance to rebut that presumption. *Cornerstone Investments, Inc v Cannon Twp*, 239 Mich App 98, 108; 607 NW2d 749 (2000); see also *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 174; 667 NW2d 93 (2003).

Most importantly, however, while plaintiffs argue that the 1984 definition of family violated *Dinolfo*, the pertinent portion of both ordinances that plaintiffs challenged below and challenge here has nothing to do with the more expansive view of a functional family, nor the number of additional people who may occupy a permanent housekeeping unit but, rather, the number of unrelated persons who may occupy an apartment as part of a temporary living arrangement (i.e., groups of college students).

In *Dinolfo*, the defendants challenged a Delta Township zoning ordinance because its definition of "family" did not include a Work of Christ Community "family" - a traditional family plus six unrelated persons who lived together and functioned as a permanent housekeeping unit. *Id*. at 257. The *Dinolfo* Court, in essence, ruled that a zoning ordinance that did not allow for "functional families," that is, additional unrelated persons who wished to live as part of a permanent housekeeping unit, is unconstitutional. The Court did not hold that a community is prohibited from regulating the number of unrelated persons who may occupy a residential unit where those persons are not part of a permanent housekeeping unit. Indeed, the Court specifically noted that a city "need not open its residential borders to transients and others whose lifestyle is not the functional equivalent of 'family' life." *Id*. at 277. Moreover, this Court later upheld an Ann Arbor ordinance that provided for "functional families," but limited to six the number of other unrelated persons who may occupy a single dwelling where they did not function as a permanent housekeeping unit (college students). *Stegeman, supra* at 488, 493. In language particularly relevant here, the Court observed at 490-491:

> In short, while the *Delta Twp* decision did force zoning authorities to look beyond traditional concepts of blood and affinity in defining family under its zoning ordinances, that decision did not force zoning authorities to abandon the concept of family in its entirety as plaintiffs would suggest. Rather, it merely required zoning ordinances to take into account so-called "functional families" in its provisions for residential zoning. In fact, the Ann Arbor ordinance does just that, providing for use of single-family dwellings by functional families. At issue here is not plaintiffs' desire to rent their buildings to functional families, but to rent them to unrelated, transient college students. These are individuals who are sharing a house not to function as a family, but for convenience and economics. They do not represent a group that is bonded together and intends to live as a unit for the foreseeable future, but a group of casual friends living together for the limited duration of their education.

Again, plaintiffs argue that the zoning ordinance in effect when the overoccupancy began was void as a matter of law as of the date of our Supreme Court's decision in *Dinolfo*. Notwithstanding plaintiffs' failure to directly challenge the 1984 definition when it was in effect, were we to assume *arguendo* that the 1984 definition of family may have been constitutionally infirm, plaintiffs' claim is nonetheless without merit. As set forth above, a limit on the number of unrelated persons *not functioning as a permanent housekeeping unit* has never been held to be unconstitutional in Michigan. It is well settled that this Court may sever constitutionally invalid portions of a statute or ordinance while enforcing valid portions. *Jott, Inc v Charter Twp of Clinton*, 224 Mich App 513, 547 569

NW2d 841 (1997); see also, *Adrian Mobile Home Park v City of Adrian*, 94 Mich App 194, 196; 288 NW2d 402 (1980). Thus, assuming that the absence of a "functional family" provision in the Mount Pleasant ordinance was unconstitutional, the limit on two unrelated persons was clearly valid and enforceable.

Accordingly, for the foregoing reasons, no nonconforming use vested or continued during plaintiffs' ownership. Therefore, the trial court erred by ruling that plaintiffs had a vested, non-conforming use and incorrectly granted summary disposition to plaintiffs on this basis. The trial court's order is reversed and summary disposition is granted to defendant on plaintiffs' claim of a vested, nonconforming use.[9] Because the trial court declared the remaining issues moot and failed to minimally address plaintiffs' claims relating to the constitutionality of the 1998 ordinance, we remand for further proceedings consistent with this opinion.

We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Richard Allen Griffin
/s/ Henry William Saad

[9] We note, further, that plaintiffs concede a good faith requirement for purposes of establishing a vested, nonconforming use. The record clearly reflects that Gray bought the Basin Building with knowledge of the zoning restriction and that he rented the apartments in knowing violation of that restriction. Plaintiffs have not established that he acted in good faith in continuing the overoccupancy.